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Supreme Court, U. S.
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In The Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-224

JOSEPH ALFRED TANNER and
JACK ALTER PEARL, *Petitioners*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO MEMORANDUM IN OPPOSITION

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I. (ANSWERING THE GOVERNMENT'S ITEM "1". (Mem. 3-4))

A. The Government (Mem. 3) interprets our point of the constitutional unpalatability of Cupp's testimony as being that "it was coerced and * * * incredible as a matter of law in light of the prior conflicting statements." But our main thrust is that the proved intrinsics of Cupp's whole indecent testimonial character disqualified him from participation in the decent procedures of judicial proof for the purposes of this case.

If there were an Olympic Gold Medal for the lying championship of the world, Alvin Junior Cupp would win it at every Olympiad during his mortal span. If there were a Nobel Prize for lying, Cupp would be Liar Laureate. If there were an all-time award combining the Victoria Cross, the Pour Le Merite and the Congressional Medal for "heroic" lying prowess, Cupp would win that. Cupp could be the exclusive occupant of a Liars' Hall of Fame. When Cupp passes on, there will be a special Liars' Valhalla for him.

Can our system of judicial proof tolerate the utter indifference to truth of a "witness" like Cupp, or the prosecutively indifferent use of such a witness? To speak reductively of "prior conflicting statements", or of mere issues of credibility for the Jury, in a federal criminal case where people face lengthy jail sentences on the uncorroborated word of a phenomenal testimonial freak like Cupp, is to ignore the larger problems of probative decency that the Constitution raises in dealing with this extraordinary type of "witness".

On grounds of the pervasive impurity of Cupp's whole inherent testimonial character, the Trial Judge should have prevented the Government, in this highly exceptional if not unique case*, from hazarding the petitioners' freedom before a lay jury on the "testimony" of such a creature. The Court should grant certiorari in this case to implement the principle

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* We quote from one of counsel's statements in the trial below (3939a): "*** Cupp may well be, by his own admission, the most phenomenal liar in the history of Court proceedings anywhere in the world. Cupp may well surpass both Titus Oates and Baron Munchhausen, because in Cupp's lying we get a combination of all the viciousness of Titus Oates plus all the preposterousness of Munchhausen."

enunciated by distinguished Judges of the lower Federal courts*—that it is the duty of a Federal District Judge in a criminal case to screen the proofs in order to determine whether they are improper for submission to the jury because, in the opinion of the Judge, as a matter of law, reasonable men could not differ in believing that a reasonable doubt exists. See our Question Presented no. 5 (Pet. 4), based on *Re Winship*, 397 U.S. 358, ruling for the first time that the reasonable doubt standard is rooted in constitutional due process. If due process was deemed in *Thompson* v. *Louisville*, 362 U.S. 199, to require promulgation of a "no evidence" rule for criminal prosecutions, how much more compellingly does not the fundamental public morality expressed in the due process clause require a "false witness" rule for criminal prosecutions. Such a "false witness" rule was implicit in *Mesarosh* v. *United States*, 352 U.S. 1.

B. The Government states (Mem. 3) that our allegations of coercion "are based on claims made by Cupp prior to his own trial, and those claims were rejected by the District Court at the suppression hearing held prior to that trial and recanted by Cupp on cross-examination in the trial below." Cupp's coercion claims which we adduce as dispositive are the *undisputed* ones never recanted by Cupp, never denied by the Government, and never negated by either of the Courts below—described at Pet. 8-10, 13-14, 16-17, 19, and summarized at Pet. 38. In the trial below Cupp did recant his *subornation* claims

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* The authorities are collected by Judge Weinstein in *United States* v. *Melillo*, 275 F. Supp. 314 (E.D.N.Y. 1967); see especially the concurring opinion by the late Judge Frank in *United States* v. *Castro*, 228 F. 2d 807 (C.A. 2 1956).

against the Government, but not the last-mentioned coercion claims.* Nor are the Government's cat-and-mouse financial bounties and parole inducements to Cupp disputed (Pet. 9-10, 11, 13, 19, 38).

C. The Government further states (Mem. 3-4) that "in these circumstances [the above incorrectly stated "circumstances" of the supposed evaporation of Cupp's claims of coercion] Cupp's testimony was properly admitted by the Trial Court", citing as "cf." *United States* v. *LePera*, 443 F. 2d 810, 812 (C.A. 9), certiorari denied, 404 U.S. 958 and *Bryson* v. *United States*, 419 F. 2d 695, 698-699 (C.A. D.C.). *LePera* holds that a defendant lacks standing to object to inducement of a co-defendant to give up his Fifth Amendment privilege under a promise of immunity, and that in any event immunity preserves the co-defendant's rights under the privilege. *Bryson* denies comparable Fifth Amendment standing to a party challenging admissibility of another's anti-*Miranda* confession. Such "cf.'s" are but pin-pricks in the present case. We are not arguing merely that Cupp's coerced testimony against petitioners is inadmissible because obtained in violation of Cupp's constitutional rights. We are arguing a spectrum, a "total atmosphere", in which the *undisputed (supra)* coercion of Cupp becomes more constitutionally meaningful in conjunction with (1) Cupp's atrocious testimonial character, and (2) our companion claim of Fourth Amendment violation in coercively obtaining Cupp's testimony as a fruit of the illegal seizure of the defense attorneys' secret files (Pet. 11-26, 37-38, 39-43).

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* Cupp has now renewed the subornation charges against the Government in the mid-appeal (in the Court below) re-recantations volunteered by him to defense representatives. See Pet. 2-3, 5 (Question Presented no. 8), and Pet. A21 at n. 23 (op. Ct. App.).

D. The Government (Mem. 4) distinguishes our case from *Mesarosh* v. *United States*, 352 U.S. 1, on the ground that, unlike the jury in *Mesarosh*, our jury "had been presented with all relevant impeaching information and allegations", citing *Hoffa* v. *United States*, 385 U.S. 293, 311-312. It is true that the *Mesarosh* jury had none of the "impeaching information and allegations" there involved, but our jury likewise did not have a vital part of the impeaching material, the seized tapes which Cupp and the Government claimed were suborned by the defense and which the Trial Judge refused to let the jury hear (or even see in transcript form) except for playing a few minutes of one of the tapes.* Further, the *Mesarosh* impeaching items were all *post-trial* and *purely collateral*; ours (the seized tapes) were *pre-trial* and *directly material* to the single win-or-lose trial issue of whether Cupp was worthy of belief. More acutely, the result of not letting our jury hear the tapes after Cupp branded them as suborned by the defense, was that Cupp's prior charges of subornation by the Government were now neatly disposed of by turning the subornation blame back onto us while at the same time preventing us from answering the charge in the only effective way possible, namely, by letting the jury hear how Cupp sounded on the tapes.** Further, in

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* See also the Government's incorrect statement at Mem. 3 that "[Cupp] was extensively cross-examined during the trial below, on the basis of * * * the tape recordings which he had made for petitioners * * * ". The only use we were allowed to make of the tape recordings was to ask Cupp if he made them and whether they were true. When Cupp admitted making the statements on the tapes and said he had lied in those statements under subornation by defense representatives, we were not permitted to cross-examine him further by playing the tapes or reading transcripts for the jury to test out the verisimilitudes of Cupp's claim that the many hours of tapes had been concocted by the defense rather than being his own spontaneous and free utterances (see Pet. 34-35, 43-46).

** Nor, of course, did our jury have the post-trial (and, unlike *Mesarosh*, the directly material) items referred to in our Question Presented no. 8 (Pet. 5), Cupp's mid-appeal recantations.

Mesarosh the Government declined to concede the untruthfulness of the trial testimony, conceding only a new credibility problem in light of untruthful collateral post-trial items, yet the Government and all the Justices of this Court in *Mesarosh* were in agreement that some corrective proceedings were needed solely because the witness' general veracity had thus been collaterally tainted post-trial. Here, *a fortiori*, the issues of general veracity are trial-contemporaneous; the *Mesarosh* post-trial "psychopath" surmises there broached by the Solicitor General and the Court are here indicatedly far more compelling and are moreover of contemporaneous impact; and here the contemporaneous factors of indicated taint are dramatically reinforced by directly material post-trial re-recantations.* The Solicitor General should have come forward here à la *Mesarosh*. (Mark Twain could quip, "Everybody talks about *Mesarosh*, but nobody ever does anything about it.")**

II. (ANSWERING THE GOVERNMENT'S ITEM "NO. 2" (MEM. 4-6))

A. Since the Trial Court ruled the seizure of the tapes unlawful (Pet. 20; see 4560a-4564a), our Petition herein did not set forth certain circumstances of the illegal seizure which must now be mentioned in view of the Government's Memorandum In Opposition:—

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* See the last preceding footnote.

** As to the Government's reference (Mem. 4) to *Hoffa* v. *United States*, 385 U.S. 293, 311-312, in aid of its distinguishing the *Mesarosh* case, we note: (1) Partin, the challenged, witness in *Hoffa*, had strong *ad hoc* motives to lie, but he was not a chronic testimonial freak like Cupp or an acute testimonial "sport" like Mazzei (the *Mesarosh* witness). (2) This Court emphasized in *Hoffa* that the jury was given special credibility instructions about Partin (385 U.S. at 312). We were refused special requested instructions on Cupp's credibility (355a-357a; and see 354a-362a; see our Question Presented no. 5 (Pet. 4)).

The adjudicatedly illegal seizure here involved presents a situation of Fourth Amendment outrageousness. The *undisputed* facts on this subject appear at 78a-84a, 104a-117, 320a-323a, 335a-353a. The seizure was incident to a "draft card" arrest of petitioner Pearl on July 16, 1967 in Chicago. (Pet. 11-12). F.B.I. agents had been shadowing a secret rendezvous of Pearl and Cupp. Cupp had initiated the contact with Pearl while Cupp was ostensibly in the Government's camp. F.B.I. cars closed in on Pearl and Cupp, they grabbed Cupp into one car and Pearl into another. Pearl was carrying the briefcase containing the secret tapes and other confidential defense records. Events moved very rapidly, as both Cupp and Pearl ended up shortly in separate custody at the Federal Building. Cupp was placed under arrest for carrying a gun that the F.B.I. knew for months he was carrying. Pearl was placed under arrest for not having his draft card in his possession. Pearl was a 38 year old, 350 pound diabetic. Very shortly after they all arrived at the Chicago Federal Building, the F.B.I. seized Pearl's briefcase on instructions from an Assistant United States Attorney.

At no time in the pre-trial or trial proceedings involving this seizure did any of the Government's people directly familiar with the above happenings assert or suggest that they did not benefit from the seizure of the tapes because Cupp had already told them about the tapes. The first time the Government made any such claim was in the appeal below (G.Br. 30, 34-36), basing the claim on a gleaning of some random assertions by Cupp that at some unspecified stage during the fast-moving events of July 16, 1967 after the F.B.I. grabbed Cupp and Pearl and before they seized Pearl's briefcase, Cupp told an F.B.I. agent he had made tapes for Pearl in return for a promise of money from the Unions. These same record gleanings are relied on by the Government in this Court (Mem. 5). But Cupp has testified at least three different ways as to the

relevant sequences of the seizure in relation to when or whether Cupp gave the Government any significant information -- or any information – in the short time between the arrests and the seizure. Cupp has said (1) that he told an agent about the tapes while still riding in the agent's car to the Federal Building, (2) that he did not tell until after arrival at the Federal Building, and (3) that the first he knew of the Government's doings with the tapes was when he heard the tapes being played at the Federal Building (Mem. 5; 2869a-2871a; 1446a-1455a). In the appeal proceedings below, so unsure was the Government itself of this belated claim of a tip-off from Cupp before the tapes were seized, that the Government tried to shore up its flimsy record position on the point by suggesting a hearing in which "we would be prepared to establish the extent of the Government's knowledge of the contents of the tapes prior to the seizure" (G.Br., Ct. App., p. 35, fn. 76). *(It is wonderful to see how this extrapolative claim of the Government, "like increase of appetite, grows by what it feeds on", as this case moves higher into the appellate echelons and therefore remoter from practical access to the crushingly voluminous 30,000 pages of this appeal record.)

In *United States*, v. *Edmons*, 432 F. 2d 577 (C.A. 2, 1970), briefly discussed by us at Pet. 39–40, there were also involved adjudicatedly illegal evidentiary fruits of a phoney draft card arrest. Judge Friendly, writing for the Court in *Edmons*, might have been speaking of our own case here when he said in *Edmons*, "The case here differs significantly from most that have dealt with the use of 'fruits' of illegal arrests. The arrests here violated the Fourth Amendment not because law enforcement officers crossed the line, often a shadowy one, that separates probable cause from its lack, but because they

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* No such hearing has ever been held. Petitioners would welcome such a hearing.

deliberately seized the appellants on a mere pretext [for derivatively unconstitutional identification purposes]". Judge Friendly could also have been speaking of our case when he said in *Edmons*, "Moreover, in applying the exclusionary rule as a deterrent device, account should be taken of the degree of police misconduct. It would be hard to think of a case where the role of exclusion as a deterrent emerges more clearly than here, where * * * the well-trained officers of the FBI [engaged in] conduct they must have known to be unlawful". The *Edmons* decision moreover affords a fascinating insight into just how outrageous the Pearl "draft card" arrest in our case was, the arrest on which the "incident" seizure of Pearl's briefcase was sought to be justified. For, Judge Friendly notes in *Edmons* that "* * * appellants' counsel tells us he has been unable to find any case where a person bound to register for Selective Service has ever been prosecuted for inadvertent failure to have his card on his person, as distinguished from having intentionally parted with it; several of the agents testified they had never heard of such a case, and the Government has proferred nothing to the contrary". Well, if the parties or the Court in *Edmons* had checked the Pearl "draft card" docket in the Trial Court below, 67 Cr 456, they would have found the unique precedent that no one else ever heard of before or since, until the prosecutive gentlemen in this case saw fit to blaze their new trail of arrant unconstitutionality in this case by arresting Pearl for inadvertently not having his draft card on his person, purely as a pretext for unconstitutionally seizing his breifcase with the tapes.

We have been told over and over again by the Government and the Courts below that our "poisoned fruit" theory here is too remote, legally unsound. The *Edmons* reasoning of Judge Friendly "* * * that the greater the Fourth Amendment outrage the greater should be the judicially consequent deterrent sanction against the police * * *", is applicable to our

case. The constitutional outrageousness of the original poisoning deed–the shamelessly unprecedented phony draft card arrest and search-seizure–combined with the likewise shameless stubbornness with which the Government went on waging its unconstitutional efforts for nearly two years to force Cupp back into its camp, cry out for a deterrence in this case of the only kind that would effectively teach the constitutional lesson here needed, namely, an order of remand by this Court directing suppression of Cupp's prosecution testimony in this trial and dismissal of the indictment.

B. The Government has not replied to our argument (Pet. 21, 41) that once the Trial Judge ruled the seizure unlawful, it was the Government's burden to prove that the prosecution thereafter was not tainted by the seizure. *United States* v. *Schipani*, 289 F. Supp. 43, 54-60 (E.D.N.Y. 1968, Weinstein, J.), affirmed 414 F. 2d 1262 (C.A. 2, 1969), cert. denied 25 L. Ed. 2d 102 (Judge Weinstein's opinion exhaustively reviews the authorities). See also *Nardone* v. *United States*, 308 U.S. 338, 341. Can it be said on this record, or on the present certiorari papers of the parties, that the Government has met this burden of negating that the seizure of the secret defense records led to the "poisoned fruit" consisting of the Cupp testimony in the trial below?

C. The Government misapprehends (Mem. 4-5) our contention that the seizure of the defense records was an unconstitutional intrusion into defense secrecy. The Government reductively treats our point as having to do only with surprise help that Cupp might have given the defense in some overall, undefined chronology of this case. The unconstitutionally fatal damage to our rights, however, must be assessed in sharply specific time settings which have now long gone by, and which are therefore irretrievable – except through judicial redress now against what the Government then did. At Pet. 23-26 we quoted

items from the record indicating the secret strategic options of the defense which were destroyed by the unconstitutional seizure. For example, but for the seizure we could have pressed effectively for prompt trial in 1967, a trial in which, as Cupp secretly had told us, he was still going to be a Government witness but would have pre-armed us with "the ammunition to break him down" (70a-71a). In such a trial, coming promptly in 1967 on the heels of the secret Cupp tapes, is it conceivable that any jury would have convicted? Now, in the long aftermath of the appellate attritions, the Government soothingly suggests that "Cupp's testimony at his own trial and at the suppression hearing preceding it was generally consistent with his recorded statements, so that similar testimony by him at petitioners' trial would not in any event have constituted a strategically valuable surprise" (Mem. 5). But what a difference it would have made to the constitutionally justified hopes of our petitioners if at a trial in 1967 we could have impeached Cupp's grand jury testimony *via* the secret tape recordings, and with Cupp's cooperation on the trial witness stand, rather than to have Cupp testify in the 1969 trial below – when the Government had unconstitutionally enjoyed an extra two years after the illegal seizure of the tapes in which to break Cupp's spirit by renewed jailings of exacerbational cruelty and by the crushing imposition of a new ten year sentence upon him after they isolated him for severed trial before trying our own people.

The Government – and the Courts below – keep saying that the strategic posture of this case was not affected to the constitutional injury of petitioners by the illegal seizure of July 16, 1967. Such reasoning would be correct only if the sad day comes when the due process clause is amended to read, "No person shall be deprived of life, liberty or property unless the end justifies the means".

D. As noted in other connections *supra*, the Government (Mem. 5-6) answers our point about the non-playing of the Cupp tapes with the argument that since one of the tapes was played for a few minutes that was enough. This obliges us to expand upon our treatment of the subject in our Joint Petition:-

The dominating fact in this trial was Cupp's history of switching sides. Everything depended on what the jurors would conclude was the true explanation of Cupp's switches of allegiance. That this question was uppermost in the Government's own thoughts at trial was shown when the Prosecutor hastened to alert the jurors in the climactic words of his opening statement that "the evidence will show that * * * based on prior loyalties to the union and because of certain monetary promises which had been made to him by the Union, Alvin Junior Cupp later recanted his entire testimony before the Grand Jury. The evidence will show that subsequent to that Alvin Junior Cupp committed perjury. * * * The evidence will show that later, late in the year of 1968 and earlier, in January of 1969, Alvin Junior Cupp became fed up with unfulfilled promises and protecting his friends who were not friends" (Tr. 64-66). Defense counsel at once objected, saying "Your Honor, doesn't this infringe upon the area of the deferred proceedings and deferred pre-trial proceedings?", to which the Court replied "No, it doesn't" (Tr. 65). Other defense counsel objected on additional grounds (*ibid.*). It will be recalled (Pet. 21-22) that the pre-trial suppression issues had been reserved until trial for further proof–particularly the testimony of Cupp. We had thought there were going to be supplemental suppression proceedings at the trial in the absence of the jury. That is why we were surprised when the Prosecutor in his opening statement, *supra*, bared the suppression subject matter to the jury. We thereafter assumed, in view of this opening statement, that Cupp would testify in direct examination on the topic thus introduced by the Prosecutor.

Incidentally, this was the first time in the case we had heard anything from the Government about any theory of Cupp's having been promised money to recant his Grand Jury testimony or commit "perjury" on behalf of the defense. This was a totally new theme in the case. We now became attentive to what Cupp would be saying in his direct examination about this theme as promised by the Prosecutor. We were expecting to hear direct testimony from *Cupp* on this subject, because we were sure the Government was not going to be having—and in fact it did not then have and apparently has never had—any other witness except Cupp who would testify that Cupp had been suborned or attemptedly suborned by the Unions. But Cupp's direct examination did not touch upon this subject of Union subornation. Cupp's direct examination was devoted exclusively to the usual prefatory personal recitals plus testimony in support of the charges in the indictment (1820a-2179a). Defense counsel moved for a mistrial, "on the ground that the Prosecutor's opening included nefarious and invidious matters which have now not been submitted as part of their proof on direct". The Court replied "They haven't rested their case. They have had one witness * * *" (Tr. 429). (As above said, the Government was not going to be having any other witness except Cupp on this subject of subornation by the unions.)

The Government's tactic in having promised evidence on this subject, in the opening statement, and then not questioning Cupp about it on direct examination, was, obviously, to maneuver the defense into eliciting this subject ourselves in our cross-examination of Cupp. And that is what we did, because we had no choice; we had to examine Cupp impeachingly on the subject of his prior statements, including the tape recordings. And, as the Prosecutor's opening statement had portended, Cupp's line of response was—we paraphrase—"I lied for the unions because they promised me money".

But the Government had a deeper tactic, which emerged only later in the trial. By *not* having Cupp testify on direct examination that the tapes he had made for the defense were suborned, the Government was maneuvering to free Cupp (and itself) from a trial hazard that the Government wanted to avoid at all costs, namely, the hazard of letting the defense play the Cupp tapes for the jury.

Under axiomatic rules of evidence, if Cupp had testified *on direct examination* to some such effect as, " Mr. X and Mr. Y, acting for the defendants or the Union, fed me false pre-prepared and pre-rehearsed scripts to recite on a tape recorder in return for a promise of money", the defense would of course have been entitled both on *cross-examination* of Cupp as to such *direct testimony*, and by introducing *"rebuttal"* proof, *to play the tapes* so as to let the jurors test whether Cupp's words on the tapes sounded rehearsed or not.

But when the Government kept Cupp from saying anything about the allegedly faked tapes on his *direct examination*, the Government was then in the position of being able to argue (speciously, but with seeming plausibility) that the defense became obliged to function within the framework of the testimonial rules which govern *impeachment* of a witness on *cross-examination, for statements made by him in the cross-examination.*

We have argued at Pet. 43–46 that even though the Government effected its maneuver of keeping the "faked tapes" issue out of Cupp's direct examination, we should have been permitted in the circumstances of this case to confront Cupp with a playing of the tapes in their entirety before the jury. Indeed, the very fact that the Government did effect this paltry maneuver *in an effort to keep the jury from learning the truth about how the tapes actually sound*, should have been perceived

by the Courts below as strengthening rather than weakening our ultimate due process right to play the tapes.

A witness like Cupp who confesses, nay, boasts, in open Court, that he can make up on the spur of the moment any kind of lie and does not hesitate to do so or to swear to it, that at the very moment in which he sits there testifying on the witness stand under oath he adheres unswervingly to his ethic of "testimony for sale", that he has gyrated and convoluted and somersaulted and flip-flopped (and whatever other cognate verbs of lurid hyperbole one may think of for this situation) over the crazy landscape of this case for seven years or more—such a witness needs exceptional control measures at the hands of a Trial Judge. In this case exceptional measures were needed on the part of the Judge to ensure that the defense would have at least a minimally fair opportunity—by playing the tapes—to counter before the jury Cupp's inflammatory testimony on the supreme issue in this trial that the reason why Cupp had several times repudiated his Grand Jury testimony was that the tape recordings which he made for the defendants were suborned for money, pre-rehearsed, corruptly fabricated.

But to the Trial Court this supremely important question of the playing of the Cupp tapes was nothing more than a reductively standardized problem of a party's right to impeach the opposing party's witness as to statements made by the witness in cross-examination which had not been made by him in direct examination.*

Here became combined (1) the unfair consequences of the Government's trick in omitting from Cupp's direct examination any questions about the faking of the tapes or why Cupp had

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* The Court of Appeals did not refer to this procedural facet at all (Pet. A1 to A21).

made repeated switches of allegiance, with (2) the Trial Court's ill-advised preoccupation with the conventional procedures of "impeachment" of a witness under cross-examination.

In this combination of prosecutive trickery and misplaced judicial orthodoxy, there came about the all-but-incredible result that we were not permitted to play the Cupp tapes before the Jury—except for one short fragment of one of the tapes.

As noted, the Government argues (Mem. 6) that the playing of this short fragment was enough. The fragment consisted of relatively innocuous prefatory portions of the first tape made by Cupp (Pet. 44), of a conversation with Pearl; the all-important tapes of Cupp's conversations with defense attorney Evans, which Cupp later (at this trial) said were suborned by Evans on behalf of petitioners and the Unions were not played at all.

The one short fragment of the one tape that the jury heard, and which the Government now says was enough for the purpose of fairness to Petitioners, was used by the Government at trial for an opposite purpose. This one fragment was exploited in the Prosecutor's closing summation at the trial to accuse the defense of having made Cupp drunk during the tape recording session. (4376a-4377a) i.e., the Prosecutor presumed to tell the jury what Cupp's speech sounded like on the very tapes that the Government had fought tooth and nail to prevent the jury from hearing. But this was not all. The Prosecutor branded the tapes as "infamous", and impunged the entirety of the tapes on the assertion that Cupp must have been drunk and that the jurors had heard a few minutes of one tape from which the Prosecutor asked the Jurors to "remember Alvin Cupp's voice on it, the slurred pronunciation, the disconnected phrases? Did he have two drinks or were they pouring drinks down him all day long while promising him that money in order

to get him to make those tapes?" (4376a-4377a). One hardly knows where to begin in expressing one's sense of protest against this conduct of the Prosecutor. Was it we who brought it about that only a few minutes of only one of the Cupp tapes was played for the Jury; was it not we who wanted all the tapes played, and was it not the Prosecutor who practically writhed in martyred agony at the podium time after time in terror lest the Heavens should fall upon the United States of America if these tapes were played for the Jury? And was not our plea for the playing of the tapes repeatedly explained as seeking that the Jurors hear the verisimilitude of Cupp's own voice and inflections to disprove the implication that anybody bribed, wined or otherwise induced him to make the taped statements? So, now, from this same Prosecutor who foamed against the playing of the tapes as a disaster to Federal justice, for this same Prosecutor now to foam before the Jury that the miniscule fragment of the tape they did hear proves the Government's charge of seduction of Cupp with alcohol and lucre, is intolerable to due process. Can this Court let go by, as calling for no corrective action, this situation in which, after we were gagged and shackled in regard to the playing of the tapes, the Prosecutor leaped at the defendants' throats to rend them before the eyes of the Jury on this very issue of *how the tapes actually sound?* If the within proceedings in the Trial Court below are to stand in the annals as a proper American due process trial by a Federal Jury, and not as a gladiatorial carnage for that Jury's vulgar delectation, this Court should grant certiorari relief on the grounds advanced in this paragraph without more.

III. (CUPP'S LATEST RE-RECANTATIONS AGAINST THE GOVERNMENT, MADE DURING THE APPEAL IN THE COURT BELOW)

The Government refers (Mem. 6) to additional questions raised in our petition which we preserve in the event of the granting of certiorari, and the Government states that "To the extent these questions were raised and considered below, we rely on the opinion of the Court of Appeals as setting forth our position" *(Ibid)*.

One of the questions thus preserved is our no. 8 (Pet. 5), relating to the new recantations cited in the heading above. Since the Government adopts the position of the Court of Appeals *(supra)*, we note that on our said Question no. 8 the position of the Court of Appeals is set forth in its opinion as printed in Pet. A21, n. 23. The Clerk of the Court of Appeals, at our request, sent to the Clerk of this Court under date of August 31, 1972 a supplemental certification of the record items relating specifically to the mid-appeal Cupp recantations, consisting of (we quote from the supplemental certification):

> "1. ORDER ENTERED OCTOBER 20, 1971 ALLOWING APPELLANT LEAVE TO FILE MOTION FOR LEAVE TO FILE MOTION REFERRED TO AT ORAL ARGUMENT.
>
> 2. APPELLANT'S MOTION FOR LEAVE TO FILE ATTACHED AFFIDAVIT OF COUNSEL FILED OCTOBER 28, 1971.
>
> 3. APPELLEE'S RESPONSE TO MOTION FOR LEAVE TO FILE A CERTAIN MOTION FILED NOVEMBER 8, 1971."

CONCLUSION

It is respectfully submitted that the joint petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners
Joseph Alfred Tanner and
Jack Alter Pearl